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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

RIPPLE LABS INC., ET AL.,

 Plaintiffs,

 v.

 YOUTUBE, LLC,

 Defendant.

CASE NO.: 3:20-cv-02747-LB

**YOUTUBE, LLC’S NOTICE OF
 MOTION AND MOTION TO
 DISMISS PLAINTIFFS’
 COMPLAINT**

Date: August 27, 2020
 Time: 9:30 a.m.
 Dept.: Courtroom B, 15th Floor
 Before: Magistrate Judge Laurel Beeler

Complaint filed: April 21, 2020

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on Thursday, August 27, 2020 at 9:30 a.m. in Courtroom B, 15th Floor, United States District Courthouse, 450 Golden Gate Ave., San Francisco, California, 94102 before the Honorable Laurel Beeler Defendant YouTube, LLC (“Defendant”) will, and hereby does, move this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing Plaintiffs’ Ripple Labs Inc. and Bradley Garlinghouse Complaint.

The motion is based upon this Notice of Motion and Motion; the Memorandum of Points and Authorities in support thereof; the Proposed Order filed concurrently herewith; the pleadings, records, and papers on file in this action; oral argument of counsel; and any other matters properly before the Court.

STATEMENT OF REQUESTED RELIEF

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and 47 U.S.C. § 230(c), YouTube requests that the Court dismiss Plaintiffs’ claims for Violation of California’s Statutory and Common Law Right of Publicity, Cal. Civil Code § 3344, Violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and contributory trademark infringement under federal law, 15 U.S.C. § 1114(1).

STATEMENT OF ISSUES

1. Whether Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c)(1), bars Plaintiffs’ state law claims.

2. Whether Plaintiffs’ Complaint should otherwise be dismissed under Rule 12(b)(6) for failure to state a claim.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs have sued YouTube for allegedly failing to do enough to prevent third-party fraudsters from hijacking various YouTube user accounts and perpetrating a crypto-currency scam through those stolen accounts. YouTube did not orchestrate or participate in that scam, and after being notified about fraudulent content posted by the hijacked accounts, YouTube removed it. Plaintiffs’ state-law claims are barred by Section 230 of the CDA, 47 U.S.C. § 230 (“Section 230”), and all their claims fail of their own accord.

1 Plaintiffs Ripple Labs Inc. (“Ripple”) and Bradley Garlinghouse, Ripple’s CEO, operate
2 an “enterprise blockchain company” that developed and manages the cryptocurrency “XRP” and
3 related services. In recent years, Ripple has noticed that scammers have come up with an array of
4 schemes to defraud owners of their cryptocurrency via social media. These schemes are not
5 unique to either Ripple’s XRP cryptocurrency or YouTube’s platform. But Plaintiffs believe that
6 some of the scammers have used hijacked YouTube accounts to perpetrate their scheme and that
7 YouTube should have done more to stop those third-parties from posting deceptive content on
8 the service. Thus, even though YouTube itself is a victim of the scam, Plaintiffs have brought
9 this lawsuit asserting that YouTube violated their statutory and common law right to publicity,
10 California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (“UCL”), and their rights
11 under federal trademark law, 15 U.S.C. § 1114(1). Plaintiffs have not filed any claims against the
12 actual fraudsters.

13 As an initial matter, Plaintiffs’ state-law claims run directly into the immunity provided
14 by Section 230. This immunity “provision [was] enacted to protect websites against the evil of
15 liability for failure to remove offensive content.” *Fair Housing Council v. Roommates.Com,*
16 *LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc). That is precisely what Plaintiffs seek to do
17 here. They do not contend (nor could they) that YouTube perpetrated the fraud or created any of
18 the scam content. Instead, Plaintiffs wish to hold YouTube liable for not acting more
19 aggressively to monitor, block, and remove the material that third-party fraudsters have posted.
20 Section 230 categorically bars such claims and requires dismissal with prejudice of Plaintiffs’
21 state-law causes of action.

22 Even apart from Section 230, Plaintiffs fail to state a viable claim. Plaintiffs’ right of
23 publicity claims fail because there is no plausible allegation that YouTube itself (as opposed to
24 the third-party fraudsters) ever actually used Mr. Garlinghouse’s identity, and under established
25 law it is not enough to allege that YouTube merely contributed to or aided the purported
26 misappropriation. Similarly, Plaintiffs cannot support a claim under the UCL because all of their
27 allegations are directed at frauds committed by third-parties, and the UCL does not create a cause
28 of action for what is effectively secondary liability. Finally, in an attempt to make an end-run

1 around Section 230, Plaintiffs assert that YouTube is liable for contributorily infringing Ripple’s
 2 federally registered trademarks. But Plaintiffs do not allege that YouTube had knowledge of any
 3 specific instances of trademark infringement that it failed to remove, and as a matter of law
 4 YouTube had no affirmative obligation to preemptively seek out and remove potentially
 5 infringing content. For these reasons, all of Plaintiffs’ claims should be dismissed.

6 **FACTUAL & PROCEDURAL BACKGROUND**

7 YouTube offers a popular online platform that allows users to upload and view videos
 8 and related content. Compl. ¶¶ 27-29. People all around the world disseminate videos on their
 9 YouTube channels, and many individuals earn money through advertising that can appear
 10 alongside their videos. *Id.* ¶ 29. Plaintiffs make no allegation that YouTube in any way condones
 11 or encourages scams or fraudulent activities. To the contrary, as Plaintiffs acknowledge,
 12 YouTube’s Community Guidelines expressly prohibit “scams” and “other deceptive practices
 13 that take advantage of the YouTube Community,” and YouTube enforces those rules by
 14 removing offending content when it comes to YouTube’s attention. *Id.* ¶¶ 30-31.

15 Ripple is a blockchain company focused on providing a global payments network. *Id.* ¶
 16 12. Bradley Garlinghouse is the CEO and “public face” of Ripple. *Id.* ¶ 22. Ripple offers a
 17 variety of software products aimed at providing financial tools for banks and corporations to
 18 facilitate international transactions. *Id.* ¶ 20. Ripple does so by touting the use of “XRP”, a
 19 “digital asset” that Ripple created using open-source, distributed ledger technology. *Id.* ¶ 21. In
 20 simple terms, Ripple has created a digital currency that can be used “quickly and securely,” in
 21 place of traditional currencies by banks and corporations. *Id.* ¶ 19. As a digital currency, XRP
 22 can also be purchased by individuals for personal uses. Ripple touts that XRP is designed to
 23 “facilitate interbank communications and transaction settlement, source liquidity for financial
 24 institutions,” and allow for “banks” to “seamlessly and transparently make global payments.” *Id.*
 25 ¶ 20. This design also apparently makes Ripple’s XRP particularly susceptible to being misused
 26 in scams as well.

27 According to Plaintiffs’ Complaint, certain unknown individuals have perpetrated a scam
 28 on YouTube through a series of steps. *First*, the scammers target the accounts of popular

1 YouTube users through a “spear-phishing” attack whereby they gain access to the user’s login
 2 credentials. *Id.* ¶¶ 34-36. This attack is generally done via email or text message, separate from
 3 the YouTube platform. *Id.* ¶¶ 34-36. *Second*, the scammers use those stolen credentials to hijack
 4 the account and strip the YouTube channel of its existing content, replacing it with material that
 5 makes it appear as if the channel is associated with or created by Ripple or Mr. Garlinghouse. *Id.*
 6 This can involve the scammers uploading new videos (often repurposing videos from other
 7 sources, including from media appearances by Mr. Garlinghouse) to the channel, changing the
 8 channel’s name, and/or changing identifying images to display pictures of Mr. Garlinghouse,
 9 Ripple, or XRP. *Id.* *Third*, in the text description of the videos posted on the channel, the
 10 scammers will suggest that if viewers wish to “participate in the Giveaway” they can send a sum
 11 of XRP to a specific virtual wallet and will receive a greater amount in return. *Id.* ¶ 35. Once the
 12 deceived viewer sends the currency, “their XRP is gone” with nothing in return, and it seems that
 13 Ripple, because of the design of its system, has no ability to recover or return the XRP that the
 14 victims of the scam have transferred to the fraudsters. *Id.*

15 Plaintiffs do not allege that YouTube has any relationship with the scammers, that
 16 YouTube itself participated in or encouraged the scam, or that it created any of the allegedly
 17 fraudulent content used to perpetrate the scam. Instead, Plaintiffs claim that YouTube
 18 unwittingly perpetrates the scam by “serving as a primary platform host” and by allegedly
 19 allowing third-parties to purchase and run advertisements relating to the scam. *Id.* ¶¶ 36-37.
 20 Plaintiffs also fault YouTube for supposedly responding “belatedly” to the fraud and for not
 21 taking proactive steps to stop the scammers from posting misleading content. *Id.* ¶¶ 27-33, 48.
 22 Plaintiffs acknowledge that YouTube’s Community Guidelines prohibit frauds and deceptions
 23 like this (*id.* ¶ 31), and the Complaint makes clear that when Plaintiffs (or their agents) flagged
 24 instances of scam content, or of hijacked accounts that were perpetrating the scam, YouTube
 25 consistently removed that material (*id.* ¶ 48).¹ But Plaintiffs believe that YouTube, on occasion,
 26

27 ¹ Although Plaintiffs allege that they submitted hundreds of takedown requests to YouTube
 28 (*id.* ¶ 48), nowhere does the Complaint allege that Plaintiffs or their agents ever submitted a

(continued...)

1 did not respond fast enough to Plaintiffs' complaints and that YouTube should have done more
 2 on its own to find and remove scam content that Plaintiffs had not specifically brought to
 3 YouTube's attention. *Id.* ¶¶ 48-53.

4 Based on these allegations, Plaintiffs filed this lawsuit. The Complaint alleges state law
 5 claims against YouTube for violations of California's statutory and common law right of
 6 publicity, Cal. Civil Code § 3344, California's Unfair Competition Law, Cal Bus. & Prof. Code
 7 § 17200, and a claim for federal trademark infringement, 15 U.S.C. § 1114(1).

8 **ARGUMENT**

9 To survive a motion under Rule 12(b)(6), "[t]hreadbare recitals of the elements of a cause
 10 of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S.
 11 662, 678 (2009). Instead Plaintiffs must allege "factual content that allows the court to draw the
 12 reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court is not
 13 required to "assume the truth of legal conclusions merely because they are cast in the form of
 14 factual allegations." *Prager Univ. v. Google*, 2018 WL 1471939, at *3 (N.D. Cal. Mar. 26, 2018)
 15 (quoting *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)). It is well settled that Section
 16 230(c)(1) is a proper basis for dismissing claims under Rule 12(b)(6). *See, e.g., Dyroff v.*
 17 *Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019); *Kimzey v. Yelp! Inc.*, 836
 18 F.3d 1263, 1268 (9th Cir. 2016); *accord Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir.
 19 2014) (explaining that dismissal under Section 230 is proper when "the statute's barrier to suit is
 20 evident from the face of the complaint").

21 **I. SECTION 230 BARS PLAINTIFFS' STATE LAW CLAIMS**

22 Section 230 "protects certain internet-based actors from certain kinds of lawsuits."
 23 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). The specific provision at issue here,
 24 Section 230(c)(1), "protects websites from liability under state or local law for material posted
 25 on their websites by someone else." *Dyroff*, 934 F.3d at 1097 (quoting *Doe v. Internet Brands*,

26
 27 (...continued from previous page)
 28 notice through YouTube's dedicated system for processing trademark infringement claims
 (<https://support.google.com/youtube/answer/6154228?hl=en> (last visited July 15, 2020)).

1 *Inc.*, 824 F.3d 846, 850 (9th Cir. 2016)). It does so by barring any claims that would “treat” the
 2 provider of an “interactive computer service” as the “speaker or publisher” of information
 3 provided “by another information content provider.” 47 U.S.C. § 230(c)(1); *accord Doe*, 824
 4 F.3d at 850 (“section 230(c)(1) precludes liability that treats a website as the publisher or speaker
 5 of information users provide on the website”). In enacting this provision, Congress recognized
 6 that “[m]aking interactive computer services and their users liable for the speech of third parties
 7 would severely restrict the information available on the Internet.” *Batzel v. Smith*, 333 F.3d 1018,
 8 1027-28 (9th Cir. 2003). At its core, therefore, Section 230(c)(1) was “enacted to protect
 9 websites against the evil of liability for failure to remove offensive content.” *Roommates.com*,
 10 521 F.3d at 1174. That is precisely what Plaintiffs’ claims here seek to do.

11 **A. Plaintiffs Seek to Treat YouTube as a Publisher of Information Provided by**
 12 **Another Information Content Provider**

13 There is an established three-prong test for immunity under Section 230. “Immunity from
 14 liability exists for ‘(1) a provider or user of an interactive computer service (2) whom a plaintiff
 15 seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information
 16 provided by another information content provider.’ When a plaintiff cannot allege enough facts
 17 to overcome Section 230 immunity, a plaintiff’s claims should be dismissed.” *Dyroff*, 934 F.3d at
 18 1097 (quoting *Barnes*, 570 F.3d at 1100). YouTube readily meets this test.

19 *First*, YouTube is the provider of an “interactive computer service,” because it “provides
 20 or enables computer access by multiple users to a computer service.” *Sikhs for Justice “SFJ”,*
 21 *Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015); *accord Dyroff*, 934 F.3d at
 22 1097 (“Websites are the most common interactive computer services.”); *Gonzalez v. Google*
 23 *LLC*, 335 F. Supp. 3d 1156, 1169 (N.D. Cal. 2018) (holding that YouTube is an interactive
 24 computer service), *appeal docketed*, No.18-16700 (9th Cir. Sep. 10, 2018).

25 *Second*, it is equally clear that Plaintiffs’ claims seek to treat YouTube as the publisher of
 26 the scam content. What matters here is not the “name of the cause of action”; instead, “courts
 27 must ask whether the duty that the plaintiff alleges the defendant violated derives from the
 28 defendant’s status or conduct as a ‘publisher or speaker.’ If it does, Section 230(c)(1) precludes

liability.” *Barnes*, 570 F.3d at 1102. Whether couched as claims for violation of the right of publicity or the UCL, what Plaintiffs seek to attack is YouTube’s decision to publish—or fail to block or more quickly remove—certain videos and related content on its online platform. Compl. ¶¶ 5-6, 27-31, 48-50. Through these claims, Plaintiffs attempt to hold YouTube liable for the content of allegedly unlawful content posted on its website. That falls squarely within Section 230’s protections. *See, e.g., Kimzey v. Yelp! Inc.*, 836 F. 3d 1263, 1268 (9th Cir. 2016) (“Kimzey’s claims are premised on Yelp’s publication of Sarah K’s statements and star rating. In other words, the claim is directed against Yelp in its capacity as a publisher or speaker.”); *Barnes*, 570 F.3d at 1103 (applying Section 230(c)(1) to claims alleging negligent failure to remove content; “removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove”); *Gonzalez*, 335 F. Supp. 3d at 1170-75 (holding YouTube immune for allegedly failing to remove terrorist content); *Herrick v. Grindr LLC*, 765 F. App’x 586, 590-91 (2d Cir. 2019) (applying Section 230 to reject claims against online service for failing to stop third-party from impersonating plaintiff on the platform).

Third, Plaintiffs’ claims are based on content that third-parties created, developed, and uploaded to YouTube. There is no allegation (nor could there be) that *YouTube* perpetrated the scam, or that it created or materially contributed to any of the allegedly fraudulent content published by the scammers. To the contrary, the Complaint makes clear that unknown third-parties (whom Plaintiffs have chosen not to try to identify or sue) took control of certain users’ YouTube accounts, changed the content, and uploaded material that Plaintiffs allege improperly impersonated Mr. Garlinghouse or otherwise perpetrated the scam. Compl. ¶¶ 3, 34-35, 51-53. This effort to hold YouTube liable for publishing or failing to remove third-party content is squarely barred by Section 230(c)(1). *See, e.g., Dyroff*, 934 F.3d at 1098 (“The third prong is also met because, as stated previously and as detailed in Plaintiff’s complaint, the content at issue was created and developed by Greer and his drug dealer.”); *Klayman*, 753 F.3d at 1358 (“the complaint nowhere alleges or even suggests that Facebook provided, created, or developed any portion of the content that Klayman alleges harmed him”); *Gonzalez*, 335 F. Supp. 3d at

1 1173 (YouTube not “information content provider” of videos allegedly posted by third-party
 2 terrorist organizations); *cf. Kimzey*, 836 F.3d at 1268-69 (rejecting suggestion that “CDA
 3 immunity could be avoided simply by reciting a common line that user-generated statements are
 4 not what they say they are”).

5 Indeed, this is not the first case seeking to hold YouTube liable for allegedly not doing
 6 enough to prevent third-party scammers from posting fraudulent material relating to
 7 cryptocurrency. In *In re Bitconnect Securities Litigation*, 2019 WL 9104318, at *12-13 (S.D. Fla.
 8 Aug. 23, 2019), the plaintiffs alleged that they were victims of a Ponzi scheme promoted, in part,
 9 through YouTube videos touting fraudulent cryptocurrency investments. The court had little
 10 trouble finding that plaintiffs’ claim—which was based on the theory that YouTube failed to
 11 warn them about the scam and to remove videos promoting it—was “thoroughly foreclosed” by
 12 Section 230(c)(1). That was so even though YouTube was alleged to have provided the
 13 fraudsters “with an extraordinary reach” (including by participating in a “Partner” program that
 14 allegedly helped direct traffic to the misleading videos) and to have “profited significantly from
 15 the expose of its users to videos advertising Defendants’ purported Ponzi scheme.” *Id.*; *accord*
 16 *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1266 (D.C. Cir. 2019) (Section
 17 230(c)(1) barred claims against Google and other search engines alleging that they allowed third-
 18 party scammers to post listings that “they know are seriously inaccurate or even nonexistent to
 19 induce both legitimate and scam locksmiths to participate in paid [advertised] results to
 20 overcome the false information”). Plaintiffs’ claims here are barred for the same reason.

21 Perhaps trying to evade this obvious conclusion, Plaintiffs allege that, in addition to
 22 hosting videos, YouTube also allowed the scammers to run advertisements that appeared on the
 23 platform. Compl. ¶ 37. But this does not make YouTube into the “creator or developer” of the
 24 scam content under Section 230. There is no allegation that YouTube itself created the
 25 advertisements at issue or in any way contributed to their content. *See Dyroff*, 934 F.3d at 1099
 26 (service providers do not become developers of content unless they “materially contribute” to
 27 “the alleged unlawfulness of the content). Instead, the ads are third-party content. Compl. ¶ 37
 28 (alleging that the “ads were presented to YouTube by the scammers”). Just like the publication of

1 third-party videos, the publication of third-party ads is squarely protected by Section 230(c)(1).
 2 *See, e.g., Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009)
 3 (Craigslist immune for “its alleged failure to block, screen, or otherwise prevent the
 4 dissemination” of third-party’s advertisement). And whether YouTube “approved” or “endorsed”
 5 the ads by allowing them to be published (Compl. ¶ 37) is immaterial. *See Jones v. Dirty World*
 6 *Entm’t Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014) (rejecting argument that “when an
 7 interactive computer service provider adds commentary to third-party content that ‘ratifies or
 8 adopts’ that content, then the provider becomes a ‘creator’ or ‘developer’ of that content and is
 9 not entitled to the CDA’s protection”).

10 Unsurprisingly, therefore, courts have repeatedly rejected similar efforts to transform
 11 service providers into content developers. In *Kimzey*, the Ninth Circuit rejected the argument that
 12 Yelp could be held liable for “republishing” third-party content “as advertisements or promotions
 13 on Google”—because “this action does not change the origin of the third-party content.” *Kimzey*,
 14 836 F.3d at 1270. “Simply put,” the court explained, “proliferation and dissemination of content
 15 does not equal creation or development of content.” *Id.* at 1271. Likewise, Judge Ryu rejected
 16 arguments that YouTube’s display of targeted advertising amounted to content development.
 17 *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1167-68 (N.D. Cal. 2017) (“This theory finds no
 18 support in the case law.”), *appeal docketed*, No.18-16700 (9th Cir. Sep. 10, 2018). Plaintiffs’
 19 advertising-related allegations fare no better here.²

21 ² Plaintiffs also allege that YouTube allowed one account used in the scam to have a
 22 “verification badge” and, in other cases, was deceived by the scammers into verifying certain
 23 scam accounts (which allowed those accounts additional privileges). Compl. ¶¶ 40-43. But these
 24 allegations do not change third-party content into material that YouTube created or developed.
 25 *Kimzey* is directly on point: the Ninth Circuit held that Yelp’s implementation of a “star” rating
 26 system did not make it a content developer responsible for an alleged defamatory user review.
 27 836 F.3d at 1268 (9th Cir. 2016); *accord Dyroff*, 934 F.3d at 1099 (service provider did not
 28 become content developer by recommending content to users); *Jones*, 755 F.3d at 416-17
 (Section 230 “bars claims lodged against website operators for their editorial functions, such as
 the posting of comments concerning third-party posts, so long as those comments are not
 themselves actionable”). Plaintiffs do not allege, nor could they, that YouTube’s unwitting
 verification of scam accounts was itself unlawful or that it made a “material contribution” to the
 illegality of the scammers’ content.

* * *

Sitting en banc, the Ninth Circuit explained that “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.” *Roommates.com*, 521 F.3d at 1170-71. That is exactly this case, and it requires dismissal of Plaintiffs’ state-law claims. And because there is no way for Plaintiffs to plead around Section 230 immunity, dismissal of those claims should be with prejudice.³

II. PLAINTIFFS FAIL TO STATE A VIABLE CLAIM FOR RELIEF

Even apart from the protections afforded by Section 230, Plaintiffs cannot state a viable claim under California’s right of publicity regime, the UCL, or for trademark infringement under federal law. Through these claims, Plaintiffs are seeking to advance theories of liability that the relevant causes of action simply do not contemplate.

A. YouTube Did Not Violate Plaintiffs’ Right of Publicity

The elements of a right-of-publicity claim under California common law are: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Joude*, 2014 WL 3107441, at *6 (quoting *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1918 (1996)). Such a claim under Civil Code § 3344 requires a plaintiff to prove “all the elements of the common law cause of action” plus “a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273 n.4 (9th Cir. 2013); accord *Perfect 10*,

³ Plaintiffs may try to argue that their state-law claims fall within Section 230’s exception for intellectual property claims. 47 U.S.C. § 230(e)(2) (“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”). Any such argument is foreclosed. The Ninth Circuit has squarely held that this exception applies only to *federal* intellectual property claims. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007); *see also Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019) (reaffirming *CCBill*, and explaining that “the intellectual property exception in § 230(e)(2) was not intended to cover intellectual property claims brought under state law”). In fact, *CCBill* itself involved a claim brought under the same state-law right of publicity invoked here, which the court found barred by Section 230(c)(1). *Accord Joude v. WordPress Found.*, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (Beeler, J.) (dismissing California right of publicity claim as barred under Section 230).

1 *Inc. v. Google, Inc.*, 2010 WL 9479060, at *13 (C.D. Cal. July 30, 2010) (“[I]n order to prove a
 2 right of publicity claim under section 3344, a plaintiff must show that the defendant appropriated
 3 the plaintiff’s name or likeness for commercial purposes, and there must be a direct connection
 4 between the defendant’s use of the likeness and that commercial purpose.”).

5 Here, any right of publicity claim fails for an obvious reason: Plaintiffs do not (and
 6 cannot) allege that YouTube itself “used” Mr. Garlinghouse’s identity. As discussed above, there
 7 is no allegation that YouTube created or uploaded any of the scam videos. To the contrary, the
 8 essence of Plaintiffs’ claim is that “[s]cammers use Mr. Garlinghouse’s identity.” Compl. ¶ 77.
 9 At most, Plaintiffs allege that YouTube gave “assistance or encouragement” to the scammers by
 10 providing them access to the YouTube platform and because YouTube supposedly “awarded a
 11 verification badge” to one hacked channel. Compl. ¶¶ 82-83. Under California law, a claim such
 12 as this does not lie against YouTube. *Cross v. Facebook*, 14 Cal. App. 5th 190, 266 (2017), is
 13 directly on point. The plaintiff there similarly alleged that Facebook violated his right of
 14 publicity by allowing third-parties to create Facebook pages using his name and likeness. *Id.* The
 15 Court of Appeal rejected this claim. It explained that the “gravamen of Knight’s complaint is that
 16 Facebook displayed unrelated ads from Facebook advertisers adjacent to the content that
 17 allegedly used Knight’s name and likeness—content, Knight concedes, created by third party
 18 users.” *Id.* at 266-67. But, the plaintiff could not “offer any evidence that Facebook used his
 19 name or likeness in any way.” *Id.*

20 *Perfect 10 v. Google, supra*, similarly rejected a right of publicity claim against Google
 21 that was based on allegations that Google hosted and supplied advertisements for third-party
 22 websites that displayed models’ names and likenesses. 2010 WL 9479060, at *13-14. As the
 23 court explained, “[c]ontributing’ to someone’s violation of something is not the same as actually
 24 ‘violating’ it. P10 has not shown that Google is, in fact, inappropriately *using* the models’
 25 likenesses.” *Id.* at *40; *accord Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 809 (9th
 26 Cir. 2007) (rejecting claim for aiding and abetting right of publicity violation as unsupported by
 27 California law).

1 So too here. Just as in *Cross* and the *Perfect 10* cases, Plaintiffs allege that YouTube
 2 allows content (whether videos or advertisements) created by the third-parties to be displayed on
 3 its service in ways that Plaintiffs say violate their publicity rights. But, just as in those cases,
 4 Plaintiffs have not, and could not, allege that *YouTube itself* created any of the content that
 5 allegedly used Mr. Garlinghouse's likeness. Indeed, as Plaintiffs acknowledge, YouTube
 6 consistently *removed* the third-party content that Plaintiffs complained about as violating Mr.
 7 Garlinghouse's rights. Compl. ¶ 48. Even if, as Plaintiffs allege, YouTube did not do so in every
 8 instance as promptly as Plaintiffs might have desired, that does not remotely establish that
 9 *YouTube* itself was using Mr. Garlinghouse's name or likeness, much less that YouTube did so
 10 for YouTube's own advantage or benefit. "[A]ny right of publicity claims fail for this reason
 11 alone." *Cross*, 14 Cal. App. 5th at 267.

12 **B. Plaintiffs Have No Viable Claim Under The UCL**

13 The same problem dooms Plaintiffs' claim under the UCL. Like their right of publicity
 14 claims, the Plaintiffs' UCL claim is based on a theory of secondary liability. Plaintiffs do not
 15 allege that YouTube itself solicited, encouraged, or participated in the third-party fraudsters'
 16 scam. The Complaint points to no false or misleading statement that YouTube itself made, nor
 17 any unscrupulous business practice that YouTube instigated. Instead, Plaintiffs allege that
 18 YouTube "provide[s] substantial assistance and encouragement" to the third-party scammers
 19 (Compl. ¶ 91), repeating their basic theory that YouTube provides a platform that unidentified
 20 fraudsters supposedly used to perpetrate a scam and that YouTube did not act quickly or
 21 aggressively enough to stop those third-parties from misusing YouTube's service. *Id.* ¶¶ 34-36,
 22 91-98.

23 This is not a viable basis for a UCL claim. The Ninth Circuit has expressly held that an
 24 "*unfair practices claim under section 17200 cannot be predicated on vicarious liability.*"
 25 *Perfect 10 v. Visa*, 494 F.3d at 808 (quoting *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th
 26 952, 960 (2002)) (emphasis added). Instead, "[a] defendant's liability must be based on his
 27 personal participation in the unlawful practices and unbridled control over the practices that are
 28 found to violate section 17200 or 17500." *Id.* In so holding, the court made clear that California

1 law “precludes liability” based on the UCL “both under secondary liability and aiding and
 2 abetting theories.” *Id.* Just as with the right of publicity claim, therefore, Plaintiffs cannot invoke
 3 the UCL to hold YouTube liable for supposedly facilitating the scammers fraud or for failing to
 4 do enough to stop them from perpetrating their scheme. Such a claim fails as a matter of law.

5 Beyond that, any claim under the UCL’s fraud prong fails because Plaintiffs do not allege
 6 that they actually relied on any fraudulent statements. The UCL “imposes an actual reliance
 7 requirement on plaintiffs prosecuting a private enforcement action under the UCL’s fraud prong.”
 8 *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). A plaintiff “must allege he or she was
 9 motivated to act or refrain from action based on the truth or falsity of a defendant’s statement, not
 10 merely on the fact it was made.” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 n.10
 11 (2011). Plaintiffs do not even try to offer such an allegation here. Nor could they. Neither Ripple
 12 nor Mr. Garlinghouse were deceived by the scammer’s scheme, and they certainly did not rely to
 13 their detriment on any purported misrepresentations made by those scammers—much less by
 14 YouTube itself. Nor can Plaintiffs invoke the possible reliance by third-parties who were
 15 deceived by the alleged scammers: it is well settled that the UCL requires a showing of
 16 *individual* reliance *by the plaintiffs*. See, e.g., *O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d
 17 989, 1002 (N.D. Cal. 2014) (“UCL fraud plaintiffs must allege their own reliance—not the
 18 reliance of third parties—to have standing under the UCL”); *L.A. Taxi Coop., Inc. v. Uber*
 19 *Techs., Inc.*, 114 F. Supp. 3d 852, 866–67 (N.D. Cal. 2015) (granting motion to dismiss where
 20 plaintiffs “lack standing to seek relief under the UCL’s fraud prong” because they “do not plead
 21 their own reliance on Uber’s allegedly false advertising”). For this reason as well, Plaintiffs’
 22 UCL claim must be dismissed.

23 **C. Plaintiffs’ Contributory Trademark Infringement Claim Fails**

24 Ripple’s contributory trademark infringement claim under 15 U.S.C. 1114(1) is fatally
 25 flawed. “The tests for secondary trademark infringement are even more difficult to satisfy than
 26 those required to find secondary copyright infringement.” *Visa*, 494 F.3d at 806. To be liable for
 27 contributory trademark infringement, a defendant must have (1) ‘intentionally induced’ the
 28 primary infringer to infringe, or (2) continued to supply an infringing product to an infringer with

1 knowledge that the infringer is mislabelling the particular product supplied.” *Id.* at 807. (citing
 2 *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982)). Where the defendant provides a
 3 service as opposed to a product, courts must “consider the extent of control exercised by the
 4 defendant over the third party’s means of infringement.” *Lockheed Martin Corp. v. Network*
 5 *Sols., Inc.*, 194 F.3d 980, 984 (9th Cir. 1999). Here, Plaintiffs do not allege that YouTube
 6 intentionally induced any third-party to infringe on Ripple’s trademarks. Instead, they rely on the
 7 second theory: Plaintiffs allege that scammers have used fake or hacked accounts to infringe and
 8 that “YouTube continues to provide its platform and services to the Scammers.” Compl. ¶¶ 62-
 9 63, 72. This claim fails.

10 Other than a threadbare conclusory allegation (*id.* ¶ 72) that the Court is not required to
 11 take as true (*see Spy Phone Labs v. Google Inc.*, 2016 WL 1089267, at *4 n.55 (N.D. Cal. Mar.
 12 21, 2016) (“*Spy Phone I*”)), the Complaint offers nothing to suggest that YouTube had the
 13 degree of knowledge needed for a claim of contributory trademark infringement or that YouTube
 14 failed to act when it was supplied with the requisite knowledge. In the context of online
 15 platforms like YouTube, the law is clear that “a service provider must have more than a general
 16 knowledge or reason to know that its service is being used to sell counterfeit goods. Some
 17 ***contemporary knowledge of which particular listings are infringing or will infringe*** in the
 18 future is necessary.” *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010) (emphasis
 19 added); *accord Spy Phone I*, 2016 WL 1089267, at *4 (applying *Tiffany*’s particularized
 20 knowledge standard to dismiss contributory infringement claim against Google). Plaintiffs try to
 21 satisfy the knowledge requirement in several ways, but none succeeds.

22 Plaintiffs first allege that YouTube had knowledge based on Ripple’s “repeated takedown
 23 notices.” Compl. ¶ 65. But, as the Complaint acknowledges, whenever Ripple brought particular
 24 items to YouTube’s attention, YouTube removed that content. *Id.* ¶ 47-48. Plaintiffs do not point
 25 to a single account or piece of content identified in Ripple’s takedown notices that YouTube
 26 failed to remove.⁴ For example, Plaintiffs allege that “Ripple, its security vendor, and/or

27 ⁴ Plaintiffs say that they “submitted 49 takedown demands to YouTube that relate directly to
 28 the Scam” (along with 305 other takedown demands), but they do not allege that YouTube failed

(continued...)

1 Plaintiffs’ other agents have reported to YouTube that the hacked accounts are infringing on
 2 Ripple’s marks. Yet many accounts continue to infringe on Ripple’s protected marks while
 3 perpetuating and profiting from the Scam.” *Id.* ¶ 66. Conspicuously missing, however, is any
 4 allegation that the accounts that Plaintiffs say are continuing to infringe are ones that Ripple or
 5 its agents ever actually identified as infringing in their notices.

6 Plaintiffs only exacerbate this problem by lumping together notices that identified
 7 different issues with the scammers’ content. For example, Plaintiffs allege that they sent various
 8 takedown demands “in connection with accounts and channels that were impersonating Mr.
 9 Garlinghouse *or* infringing on Ripple’s brand, likely for the purpose of monetizing the Scam.”
 10 Compl. ¶ 47 (emphasis added). While the Complaint does not allege that YouTube failed to
 11 remove content based on those notices, Plaintiffs’ failure to distinguish complaints about
 12 impersonation of Mr. Garlinghouse (which is not trademark infringement) from complaints about
 13 actual trademark violations further undermines their claim that YouTube had knowledge of the
 14 alleged trademark violations.

15 In *Spy Phone I*, for example, Judge Grewal rejected a similar effort to conflate fraud
 16 complaints with trademark notice. That case involved allegedly infringing apps listed in
 17 Google’s Play Store. Using “Google’s online complaint form,” the plaintiff submitted numerous
 18 “trademark infringement complaints about similarly named apps, and Google regularly
 19 responded by taking down the offending apps.” 2016 WL 1089267, at *1. Later, the plaintiff
 20 submitted additional complaints about other apps, but instead of using the trademark form, the
 21 plaintiff asserted that the apps were violating Google’s anti-spyware policy. *Id.* at *2. Judge
 22 Grewal found that these complaints did not create knowledge of trademark infringement:
 23 “spyware complaints are not the same as trademark complaints, and Google could not be
 24

25 (...continued from previous page)
 26 to respond to *any* of those demands. Compl. ¶ 47. Moreover, while Plaintiffs point to certain
 27 channels that they say YouTube was slow to remove in response to Plaintiffs’ takedown notices
 28 (*id.* ¶ 48), they do not allege that any of those channels contained material that actually violated
 Ripple’s trademarks—much less that Plaintiffs’ notices specifically identified those channels as
 trademark infringing.

1 expected to respond to a complaint about one offense by investigating another.” *Id.* at *3-4.
 2 Similarly, in *Worldwide Media, Inc. v. Twitter, Inc.*, which arose from hacked Twitter accounts
 3 used to disseminate fraudulent content, Judge DeMarchi rejected the claim that Twitter had
 4 knowledge of trademark infringement based on complaints about the hacking that did not
 5 specifically assert a trademark violation. 2018 WL 5099271, at *3 (N.D. Cal. Aug. 9, 2018). The
 6 court explained that “allegations that Twitter had general knowledge or reasons to believe that
 7 some hacking could result in trademark infringement are not enough to support a claim for
 8 contributory infringement.” *Id.* So too here. Plaintiffs cannot make out a claim of contributory
 9 trademark infringement based on notices that eschewed YouTube’s trademark notification
 10 process and did not expressly allege trademark infringement.⁵

11 Perhaps recognizing this, Plaintiffs apparently base their claim on the idea that—even if
 12 YouTube removed the content actually identified in Ripple’s takedown notices—the notices
 13 made YouTube *generally* aware of the scam, such that it was required to remove accounts or
 14 material that Ripple never actually identified as infringing. Compl. ¶ 65. This argument fails as a
 15 matter of law. “Notice of certain acts of infringement does not imply generalized knowledge
 16 of—and liability for—others.” *Spy Phone I*, 2016 WL1089267, at *3. Plaintiffs cannot create the
 17 specific knowledge of infringement required for contributory liability based on notices that
 18 identified other content as infringing. *Tiffany* rejected this exact theory. The Second Circuit
 19 affirmed the district court’s holding that “while eBay clearly possessed general knowledge as to
 20 counterfeiting on its website, such generalized knowledge is insufficient under the *Inwood* test to
 21 impose upon eBay an affirmative duty to remedy the problem.” *Tiffany*, 600 F.3d at 107,
 22 *affirming* 576 F. Supp. 2d 463, 507 (S.D.N.Y. 2008). That Tiffany had sent notices that
 23 identified certain listings as infringing did not create knowledge that *other* listings were
 24 infringing or require eBay to find and remove such unidentified material. *Id.* at 109 (“[A]lthough
 25

26 ⁵ For the same reason, Plaintiffs’ allegation that “media sources have publicly reported that
 27 YouTube hosts fake Ripple accounts that perpetuate, promote, and profit from the Scam” (*id.* ¶
 28 67) is plainly insufficient. This is not remotely akin to an allegation that YouTube continued to
 provide service to particular accounts that it knew were infringing Ripple’s trademarks.

1 the NOCIs and buyer complaints gave eBay reason to know that certain sellers had been selling
 2 counterfeits, those sellers' listings were removed and repeat offenders were suspended from the
 3 eBay site. Thus Tiffany failed to demonstrate that eBay was supplying its service to individuals
 4 who it knew or had reason to know were selling counterfeit Tiffany goods.”).

5 Applying *Tiffany* to allegations of contributory infringement in Google's Play Store for
 6 online apps, Judge Westmore squarely rejected the argument that “Google had a duty to
 7 preemptively remove apps that infringed on Plaintiff's trademark.” *Spy Phone Labs v. Google*
 8 *Inc.*, 2016 WL 6025469, at *6 (N.D. Cal. Oct. 14, 2016) (“*Spy Phone II*”). That was so even after
 9 plaintiff's complaints put Google generally “on notice” of potential infringement on the Play
 10 platform. *Id.* As the court explained:

11 Plaintiff argues Google is like a flea market operator who has been put
 12 on notice that a particular vendor is selling counterfeit goods, but
 13 continues to allow that vendor to sell counterfeit goods. Not so.
 14 Plaintiff seeks to require the flea market operator not to just police
 15 specific vendors who it has been put on notice of selling counterfeit
 goods, but to also preemptively check over the goods of every vendor
 to ensure they are not also selling counterfeit goods. This is the type
 of generalized notice that *Tiffany* rejected.

16 *Id.*; accord *Spy Phone I*, 2016 WL 1089267, at *4 (“[a]bsent specific notice of trademark
 17 infringement, Google cannot be liable for failing to remove infringing apps preemptively”).

18 The same is true in this case. Plaintiffs' suggestion that because they complained about
 19 certain content, YouTube had an obligation to monitor its service to find and remove other
 20 content that might have been misusing Ripple's trademarks (*e.g.*, Compl. ¶ 50) simply is not a
 21 viable basis for contributory trademark infringement. YouTube cannot be held liable for failing
 22 to proactively prevent unidentified third-party infringement.

23 CONCLUSION

24 Plaintiffs' state law claims are barred by Section 230. Beyond that, Plaintiffs fail to state
 25 a viable claim for any of their causes of action. For these reasons, the Complaint should be
 26 dismissed, and at least as to the claims barred by Section 230, dismissal should be with
 27 prejudice.

1 Dated: July 20, 2020

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3
4 By: /s/ Brian M. Willen
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6 Attorneys for Defendant
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